Supreme Court, U.S.
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No. 01- (1) 01-76 11 1 2001

OFFICE OF

IN THE

Supreme Court of the United States

HAHN AUTOMOTIVE CORPORATION,
doing business as Autoworks, Inc.,

Petitioner,

v.

KENNETH A. TAKACS, ANDREW EVANS, LLOYD K. GALLOWAY, KATHY GRIFFITH, URSULA F. HOOKER, ANITA L. NEWMAN, DAVID H. ELEY, JANET FLEGEL, STEVEN D. BROWN, DAVID S. BRADNER, DAVID MICHAEL, MARK A. FLANNERY, JERRY S. MATHEWS, AARON T. PRICE, DENNIS M. MISIK, ERNEST E. ALLEN, ROGER DEAN KELLY, KEVIN WAYNE SIMMERS, FRANK T. MUSCARELLA, JR., ARVIL NOLE, JR., JONATHAN E. WOOD, MICHAEL W. TIMMERMAN, LEO P. WINCE, JAMES L. TEAGUE, WILLIAM ROBERT UNDERWOOD, CLIFFORD D. JOHNSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "salary basis test" of 29 C.F.R. § 541.118, interpreting the "white-collar exemptions" of the Fair Labor Standards Act at 29 U.S.C. § 213(a)(1), employers whose disciplinary policies subject administrative, professional, and executive employees to unpaid disciplinary suspensions in increments of less than a week must pay overtime to these employees. However, 29 C.F.R. § 541.118(a)(6) provides a "window of correction" under which an employer that has made deductions from employees' pay that would remove the employees from exempt status may retroactively restore their exempt status by reimbursing the employees and promising to comply with the salary basis rule in the future.

The question presented is whether the "window of correction," in accordance with the plain language of the regulation, is available to employers that have a policy or practice of making more than a single improper deduction.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Hahn Automotive Corporation states that it has no corporate parents, and that no publicly held company owns ten percent or more of Hahn Automotive Corporation's stock.

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Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 246 F.3d 776 (6th Cir. 2001) and appears in the Appendix at 1a.

The decision of the United States District Court for the Southern District of Ohio is unreported, and is reproduced in the Appendix at 17a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on April 13, 2001. No petitions for rehearing or hearing en banc were filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 213(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 213(a)(1), exempts bona fide executive, administrative, and professional employees from the overtime pay requirements of the Act, and is reproduced in the Appendix at 44a. The Secretary of Labor's definitions of "executive," "administrative," and "professional" employees are found at 29 C.F.R. §§ 541.1, 541.2, and 541.3 and are reproduced in pertinent part at pages 44a through 46a

in the Appendix. The Secretary of Labor's regulations concerning the "salary basis test," 29 C.F.R. § 541.118(a), are set forth in the Appendix at 46a through 49a.

STATEMENT OF THE CASE

Under the Fair Labor Standards Act, an employer must pay an employee at one and one-half times that employee's regular rate of pay for all hours worked in one week in excess of forty hours, unless that employee is exempt from the Act. 29 U.S.C. § 207(a)(1). The FLSA exempts from its overtime requirements any employee employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

In order for an employee to fit within the overtime-exempt category for executive, administrative, or professional employees under the regulations, the employee must be paid on a "salary basis." 29 C.F.R. §§ 541.1-.3. App. 46a.

Under the regulations, an employee is considered to be paid "on a salary basis" if the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a), App. 46a. As a general rule, an employee paid "on a salary basis" must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Id.*

There are a few exceptions to that general rule. One is that "deductions may be made . . . when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." 29 C.F.R. § 541.118(a)(2), App. 47a. "Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences." *Id.* "Deductions may also be made for absences of a day or more occasioned by sickness or disability . . . if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability." 29 C.F.R. § 541.118(a)(3), App. 47a. Finally, an employer may make deductions from an employee's salary for "infractions of safety rules of major significance," 29 C.F.R. § 541.118(a)(5), App. 48a, or for absences taken pursuant to the Family and Medical Leave Act, 29 C.F.R. § 825.206, without affecting an employee's salaried status.

The regulations also contain a corrective provision known as the "window of correction" through which an employer may remedy certain improper deductions from the salaries of exempt employees. 29 C.F.R. § 541.118(a)(6). App. 48a.

Respondents are twenty-seven former store managers and senior assistant managers who were employed at various Autoworks, Inc. ("Autoworks") store locations throughout a seven-state region.[1] As managers, Respondents were

1. Autoworks was a company engaged in the retail selling of automotive parts and products. Autoworks was acquired by Petitioner from Northern Automotive Corporation on November 29, 1993. At the time of the acquisition, Autoworks had 159 retail stores and a distribution center; and employed over 1400 employees. App. 3a.

considered exempt from the overtime provisions of the FLSA pursuant to 29 U.S.C. § 213(a)(1). JA 43.[2]

In May of 1995, as a result of a lawsuit filed against Autoworks' prior owner, Northern Automotive, Petitioner learned that Northern Automotive may have had a policy at Autoworks which allowed store managers and senior assistant managers to be suspended without pay for disciplinary reasons. JA 43.

Petitioner immediately investigated whether any such disciplinary policy existed at Autoworks and learned that a Northern Automotive policy providing for disciplinary suspensions without pay did exist at Autoworks. Utilizing the "window of correction," Petitioner instituted its own policy which complied with the FLSA, and reimbursed the seven managers who had received improper salary deductions. JA 43-45.

Subsequently, Respondents sued Petitioner, claiming that the prior Northern Automotive policy was not consistent with the salary basis test and, therefore, that they were not exempt employees. *See* 29 C.F.R. § 541.118(a)(2)-(5).

On cross motions for summary judgment, the District Court ruled that Respondents were nonexempt employees because their salaries had been subject to impermissible unpaid suspensions under the Northern Automotive policy in violation of the salary basis test; and that Petitioner could not avail itself of the regulatory "window of correction" to remedy the seven improper suspensions without pay.

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2. Citations to the Joint Appendix, filed in the Sixth Circuit in this case, are designated as "JA ___."

App. 34a. Accordingly, the District Court granted summary judgment to Respondents. App. 42a. (The District Court's jurisdiction arose under 28 U.S.C. § 1331.)

The Sixth Circuit Court of Appeals affirmed the District Court's opinion, noting that the issue of whether the "window of correction" was available to employers with either a policy or practice of making improper deductions had not yet been addressed by this Court. App. 12a.

REASONS FOR GRANTING THE WRIT

I.

CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEAL ON THE APPLICATION OF THE FLSA "WINDOW OF CORRECTION."

A. The Plain Language Of The Regulation Demonstrates That The Window Of Correction Is Available Where Deductions Have Been Made For Reasons Other Than Lack Of Work.

The salary basis test regulations promulgated by the Department of Labor ("DOL") in 1954 contain a remedial provision that employers may invoke in order to preserve employees' exempt status where deductions run afoul of the salary basis test and its myriad technical rules. It is, in essence, an equitable make-whole remedy, whereby the employer can reimburse affected employees and avoid a liability windfall. Known as the "window of correction," the regulation provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts of the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. *On the other hand,* where a deduction not permitted by these interpretations is inadvertent, *or is made for reasons other than lack of work,* the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (emphasis added). Under the plain language of this regulation, the window of correction is generally available to an employer who undertakes corrective action if the deductions at issue are "made for reasons other than lack of work."

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court affirmed the broad scope and availability of the window of correction under its plain language. Rejecting the notion that the defense is available only where deductions are inadvertent, the Court ruled that " 'inadverten[ce]' and 'made for reasons other than lack of work' [are] *alternative* grounds for permitting corrective action" under the regulation. *Id.* at 463 (emphasis added). The "window" was therefore available in *Auer* to preserve the exempt status of the employee who had suffered a partial workweek suspension.

Prior to *Auer*, courts had split on the question whether "inadvertence" was required to take advantage of the window of correction. Some courts, following *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), read the regulation conjunctively despite its plain disjunctive application. These courts required inadvertence, holding that the defense was unavailable where a policy allowing impermissible deductions was in place. *See, e.g., Spradling v. City of Tulsa*, 95 F.3d 1492 (10th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997); *Klein v. Rush-Presbyterian-St. Lukes's Med. Ctr.*, 990 F.2d 279 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). Other courts read the regulations disjunctively, allowing the defense any time deductions had been made for reasons other than lack of work, regardless of inadvertence. *See, e.g., Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428 (11th Cir. 1994); *Martin v. W.E. Monks & Co.*, No. 92-3739, 1993 U.S. App. LEXIS 20610 (6th Cir. Aug. 3, 1993); *Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990).

Auer expressly rejected the conjunctive reading of the regulation, overruling *Abshire* and its progeny. *See Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997). *Auer* thus discredits the entire line of cases disallowing the window of correction based on *Abshire*'s reasoning, including *Spradling*, *Klein* and *Malcolm Pirnie*. Instead, *Auer* affirms the disjunctive language of the regulation, which allows an employer to reimburse employees and preserve the exemption not only for inadvertent deductions, but also for deductions "made for reasons other than lack of work." *Auer*,

519 U.S. at 463. *Auer* thus implicitly endorses the many decisions preceding it in which the courts read the plain language of the regulation disjunctively and allowed corrections where impermissible deductions have been made "for reasons other than lack of work," as in the case of partial workweek disciplinary suspensions.

B. The Window Of Correction Is Available Even Where Multiple Deductions Have Been Made Pursuant To An Established Policy.

Despite the clarity of the language of the regulation, the Sixth Circuit Court ruled that the window of correction was not available to Petitioner. Deferring to the interpretation of the regulations presented by the Secretary of Labor in its *amicus* brief, the Court held that the defense was not available because Petitioner had engaged in a pattern of seven improper disciplinary deductions pursuant to a policy. *Auer*, of course, involved a single deduction and does not specifically address the basis for the Sixth Circuit's ruling. However, in the four years since the *Auer* decision, several circuits have concluded that the window of correction is available even where there have been multiple impermissible disciplinary deductions.

In the Ninth Circuit case, *Paresi v. City of Portland*, 182 F.3d 665 (9th Cir.), *cert. denied*, 528 U.S. 874 (1999), employees sued the City for overtime under the FLSA, contending that they were subject to partial workweek disciplinary suspensions and thus, should be treated as non-exempt employees. Of the sixty-two plaintiffs, two had been suspended without pay for less than one week and four had been threatened with such sanctions. *Id.* at 667.

The Ninth Circuit rejected the plaintiffs' argument "that the window of correction is not available when the employer maintains a 'pattern . . . or policy of impermissible disciplinary deductions.' " *Id.* at 668. The court found that "two actual instances of arguably impermissible deductions . . . would not sustain a finding of such a pattern or policy." *Id.* The Court stated that even if the deductions showed a pattern or policy, the defense was nevertheless available:

> *In any event*, the text of the regulations contains no such limitation [that the defense is unavailable where a pattern or policy exists]. "[T]he plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as alternative grounds permitting corrective action."

Id. (emphasis added) (quoting *Auer*, 519 U.S. at 463, and citing *Childers*, 120 F.3d at 947). Because the deductions at issue were disciplinary in nature, they were "made for reasons other than lack of work" and were thereby covered by the window of correction. *See Paresi*, 182 F.3d at 668.

The Seventh Circuit adopted a similar reading of the window of correction in *DiGiore v. Ryan*, 172 F.3d 454 (7th Cir. 1999). In that case, ten police officers sued for overtime under the FLSA. Five of the plaintiffs had suffered partial workweek disciplinary suspensions. The *DiGiore* court found that five disciplinary suspensions were insufficient to render the *entire class* of police officers "subject to" impermissible deductions. The court also found that "[e]ven if these five incidents rose to the level of frequent and, thus, *constituted an actual practice*," the employer was absolved of liability

because it had "availed [itself] of the regulatory 'window of correction.' "[3] *Id.* at 465 (emphasis added).

In *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998), nineteen management employees sued the City for overtime pay based on impermissible disciplinary suspensions. The record showed a total of six disciplinary suspensions, two of which were in week-long increments. *Id.* at 1180. The Eleventh Circuit found that the window of correction was available, reasoning that these multiple deductions had been made "for disciplinary suspensions, not for lack of work." *Id.*

The Third Circuit in *Balgowan v. New Jersey Department of Transportation*, 115 F.3d 214 (3d Cir. 1997), observed that if disciplinary deductions had been made, the employer could have used the window of correction to preserve the employees' exempt status.

Relying on the Supreme Court's *Auer* decision, district courts have similarly concluded that the window of correction is available in cases involving a pattern or practice of impermissible deductions. In *Johnson v. Chicago Housing Authority*, Nos. 94-C-7692, 97-C-3584, 1997 U.S. Dist. LEXIS 19001 (N.D. Ill. Nov. 19, 1997), App. 50a, the employer admitted that it had "improperly docked numerous plaintiffs' salaries and that it did so pursuant to an established policy." *Id.* at *8. The court held that the window of correction nevertheless was available, expressly rejecting the

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3. The Seventh Circuit in *Whetsel v. Network Property Services*, 246 F.3d 897 (7th Cir. 2001), overruled this alternate holding because the *DiGiore* court "might not have had [the Secretary's] argument before it."

interpretation of the regulations that the window of correction was unavailable in cases of a pattern or practice of impermissible deductions. Instead, the court interpreted *Auer* as making the window of correction generally available, the only exception being where deductions are taken because of a lack of work. *Id.* This result, the court reasoned, not only "comports with the plain language of the regulation, it immunizes employers who mistakenly adopt policies permitting prohibited deductions, and it saves large employers, like municipalities, from the expense of FLSA liability caused by the repeated and intentional actions of ill-informed supervisors." *Id.* at *11 n.1.

Similarly, in *Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997), a FLSA overtime case brought by thirty-nine police officers, the court determined that, based on six partial workweek disciplinary suspensions and three deductions for tardiness, the City had an actual policy and practice of impermissible disciplinary deductions, in violation of the salary basis test. *Id.* at 1469-71, 1473-74. Even so, the court ruled that the window of correction preserved the plaintiffs' exempt status, rejecting the plaintiffs' argument that it is not available "to correct an established policy." *Id.* at 1474.

These post-*Auer* decisions are consistent with the substantial body of pre-*Auer* case law that adopts the disjunctive reading of the regulation endorsed by *Auer*, and confirms the availability of the window of correction where multiple deductions have been made pursuant to an established, long-term policy or practice. *See Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990) (thirty-four plaintiffs, seven impermissible deductions pursuant to written policy); *Jackson v. Kentucky*, 892 F. Supp. 923,

936-37 (E.D. Ky. 1995) (three deductions pursuant to "longstanding policy" in exempt work force of 155); *Kuchinskas v. Broward County*, 840 F. Supp. 1548 (S.D. Fla. 1993), *aff'd*, 86 F.3d 1168 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) (seven suspensions among one hundred seventeen plaintiffs, seventy-three suspensions in exempt work force of two thousand); *Simmons v. Fort Worth*, 805 F. Supp. 419 (N.D. Tex. 1992) (two hundred deductions pursuant to "long-running policy" in exempt work force of one thousand); *International Assn. of Fire Fighters, Alexandria Local 2141 v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.3d 463 (4th Cir. 1990) (twenty-six impermissible deductions pursuant to city's administrative regulation).

In contrast, the courts in *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000), *Yourman v. Giuliani*, 229 F.3d 124 (2d Cir. 2000), and *Whetsel v. Network Property Services*, 246 F.3d 897 (7th Cir. 2001), found that a policy or practice of impermissible disciplinary deductions foreclosed the employer's opportunity to correct such violations. In these cases, the Secretary submitted amicus briefs arguing that the window of correction is available only for one-time or inadvertent deductions, and the courts deferred to the Secretary's interpretation. However, the interpretation offered by the Secretary is inconsistent with the plain language of the regulation and, thus, is not entitled to deference.

C. The Secretary Of Labor's Interpretation Is Not Entitled To Deference.

1. The Rigid Interpretation Of The Window Of Correction Regulation Urged By The Secretary Contradicts The Regulation's Plain Reading.

The Secretary's interpretation of the regulation is entitled to deference only if it is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). Here, the interpretation of the Secretary is inconsistent with the regulation because it conflates the "inadvertence" and "made for reasons other than lack of work" prongs of the window of correction regulation, prongs that *Auer* requires be read in the alternative, effectively requiring that *all* improper deductions be inadvertent. The regulation, by contrast, states that in general, "[t]he effect of making a deduction which is not permitted under these interpretations *will depend upon the facts in the particular case.*" 29 C.F.R. § 541.118(a)(6) (emphasis added). Under the regulation, intention is an issue only when an employer *generally* makes deductions when no work is available; such deductions "indicate[ ] that there was no intention to pay the employee on a salary basis." *Id.* (emphasis added) "*On the other hand,* where a deduction not permitted by these interpretations . . . is made for *reasons other than lack of work*, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." *Id.* (emphasis added). The regulation thus clearly contrasts deductions generally made for lack of work, which demonstrate a lack of intent to pay employees on a salary basis, and intentional deductions made for other reasons, which do not.

The regulation does not indicate, as the Secretary claims, that corrective action is only available for a "one-time" deduction which is inadvertent or made for a reason other than a lack of work.[4] In fact, the regulation defines the requisite corrective action in terms of multiple deductions: "the employer reimburses the employee for such *deductions* and promises to comply in the future." *Id.* (emphasis added). Thus, correction of multiple deductions is expressly contemplated by the regulation.

Furthermore, the Secretary's interpretation not only eviscerates this Court's holding in *Auer* — that the window of correction is available to remedy impermissible deductions made for reasons other than lack of work — but also "presents a tautology from which no employer could possibly escape:"

> The employees are not salaried because impermissible deductions were made. Those deductions are impermissible (and not excused

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4. The rule urged by the Secretary is too rigid. The regulation, by requiring an examination of the facts of a particular case, indicates a more fluid approach. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 904 (S.D.N.Y. 1961). Under the Secretary's interpretation, a policy or practice of disciplinary deductions precludes consideration of facts which would show the employer's intent to pay on a salary basis, such as whether deductions are made for absences due to illness, personal reasons, jury duty or military duty; or whether employees are paid a consistent amount regardless of the number of hours worked. Here, there is no contention that Petitioner's pay practices were inconsistent with the salary basis test, other than the seven disciplinary suspensions. Such partial week disciplinary suspensions, by themselves, fail to demonstrate a general intent by an employer not to pay its entire work force of exempt employees in general, or the employees who have been suspended in particular, on a salary basis.

> under the 'window of correction') because employees have been found to be not salaried. If . . . the [ ] deductions could be excused under the window of correction if not for the earlier finding of non-salaried status, then it follows that those deductions should not be considered in making the pay status finding.

Martin v. W.E. Monks & Co., No. 92-3739, 1993 U.S. App. LEXIS 20610 at *17 (6th Cir. Aug. 3, 1993) (Merritt, C.J., dissenting). App. 63a.

2. The Secretary's View Of When The Window Of Corrections May Be Utilized Negates The Underlying Remedial Purpose Of The Regulation.

The window of correction operates as an equitable remedy for all parties in salary basis test litigation. It provides at once a defense to employers that prevents loss of exempt status and the imposition of massive liability, a make-whole remedy for those *otherwise exempt* employees who experienced impermissible disciplinary deductions from salary, and quasi-injunctive relief for the exempt work force as a whole through employer assurances of future FLSA compliance.

The effect of the Secretary's interpretation is to allow employees to seek punitive rather than make-whole remedies. Punitive remedies are inconsistent with the purpose of the FLSA, which is to make employees whole for their injuries. *See, e.g., Reich v. IBP, Inc.*, No. 88-2171, 1996 U.S. Dist. LEXIS 3709 (D. Kan. Mar. 22, 1996) App. 77a (purpose of FLSA award is to make whole, not punish); *Berndt v. Kaiser*

Aluminum & Chemical Sales, Inc., 604 F. Supp. 962, 965 (E.D. Pa. 1985) (providing damages for losses not suffered would be punitive rather than remedial and inconsistent with the "make whole" policy of the FLSA).

Furthermore, the Secretary's interpretation is inconsistent with the DOL's previous acknowledgment of concerns "over the fundamental inequity of courts granting windfall awards of across-the-board retroactive overtime payments to [ ] employees who never had any actual deductions made in their salaries." *See* 57 Fed. Reg. 37666 (Aug. 19, 1992).

In this case, just seven of over four hundred managers had impermissible deductions from their salaries, made pursuant to a policy of the former owner of Autoworks. The remaining managers were completely unaffected. Because of these seven suspensions, the Petitioner now faces claimed liability of over one million dollars. Nearly all of this amount would go to individuals who lost no money whatsoever because of any regulatory violation. The window of correction provision is tailor-made for such a situation.

As the Ninth Circuit recognized in *Paresi*, application of the window of correction furthers "the policy underlying the administration of the salary basis test of 'avoid[ing] the imposition of massive and unanticipated overtime liability' " in such cases. *Paresi*, 182 F.3d at 668 (quoting *Auer*, 519 U.S. at 461). The window of correction thus prevents the "fundamentally unfair and inequitable" result of allowing "windfall awards of across-the-board retroactive overtime payments to [ ] employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions" taken. *Kuchinskas*, 840 F. Supp.

at 1557. Given the historically unstable state of the salary basis test and the great impact on both public and private employers, "it would be inequitable, to say the least, to so severely punish [an employer] for past violations of a relatively minor portion of the salary [basis] test" by ordering payment of overtime to those who are otherwise FLSA exempt. *Jackson v. Kentucky*, 892 F. Supp. at 937. The window of correction cures these inequities.

The decisions of the circuits precluding the window of correction thwart the FLSA's underlying policy and will have the effect of creating windfall recoveries for entire exempt work forces.[5] The proper remedy contemplated by the window of correction is to make whole those employees who had actual deductions taken and to clarify the employer's policies and practices to ensure future compliance.

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5. Although the FLSA's exemptions are to be narrowly construed, because it is a remedial statute its remedial provisions must be construed liberally so that the words will accomplish the purpose at which the act is aimed. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. at 904.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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